

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARK HOFFMAN, on behalf of himself and all  
others similarly situated,

Plaintiff,

vs.

HEARING HELP EXPRESS, INC.,  
TRIANGULAR MEDIA CORP.,  
LEADCREATIONS.COM, LLC and LEWIS  
LURIE,

Defendants.

NO. 3:19-cv-05960-MJP

**PLAINTIFF'S MOTION TO EXTEND  
DEADLINE TO SUBMIT EXPERT  
TESTIMONY ON WHETHER  
DEFENDANT'S DIALING SYSTEM  
IS AN ATDS**

**Note on Motion Calendar: 01/08/2021**

**I. INTRODUCTION**

Plaintiff respectfully requests that the Court extend the deadline to designate an expert on the issue of whether Hearing Help's Genesys dialing system is an automatic telephone dialing system (ATDS) under the TCPA. Plaintiff makes this request because the United States Supreme Court recently heard oral argument on this issue in *Duguid v. Facebook*, No. 19-51 (argued Dec. 8, 2020). Any decision that the Court issues will very likely bear on the criteria that Plaintiff's expert will use to evaluate whether Hearing Help's dialing system is an ATDS.

Plaintiff's requested extension will not impact any other deadline in the case, including the deadline for Plaintiff to file his motion for class certification, which currently falls on

February 25, 2021. Plaintiff will argue that the ATDS issue is a common merits issue that can be decided on a classwide basis after the Supreme Court issues the *Facebook* decision. Plaintiff intends to disclose all other expert testimony on January 15, 2021 as the scheduling order requires.

Accordingly, Plaintiff respectfully requests that the Court modify the case management schedule to extend the deadline to disclose an expert on the ATDS issue as follows:

EVENT	DATE
Reports from expert witness under FRCP 26(a)(2) due EXCEPT FOR witnesses testifying on whether Hearing Help's Genesys system is an ATDS	January 15, 2021
Deadline to move for class certification	February 25, 2021
Reports from expert witnesses under FRCP 26(a)(2) on the ATDS issue	August 6, 2021 or 30 days following the Supreme Court's decision in <i>Duguid v. Facebook</i> , whichever is earlier
JURY TRIAL DATE	November 1, 2021

## II. STATEMENT OF FACTS

This case involves claims under the Telephone Consumer Protection Act (TCPA), which prohibits, among other things, the use of automatic telephone dialing systems to generate and call cell phone numbers without the prior express consent of the called party. 47 U.S.C. § 227(b). The TCPA defines an ATDS as "equipment which has the capacity ... to store or produce telephone numbers to be called, using a random or sequential number generator; and ... to dial such numbers." 47 U.S.C. § 227(a)(1). The Federal Communications Commission had previously defined what devices qualified as ATDSs but a 2018 ruling from the D.C. Circuit questioned that definition. *ACA Int'l v. FCC*, 885 F.3d 687, 694-704 (D.C. Cir. 2018).

1 In the wake of that decision, a Circuit split has emerged about the meaning of ATDS.  
 2 The Ninth and Second Circuits concluded that “using a random or sequential number  
 3 generator” only modifies “produce,” which means an ATDS need not be able to use a random  
 4 or sequential generator to store numbers—it suffices to merely have the capacity to “store  
 5 numbers to be called” and “dial such numbers automatically.” *See Marks v. Crunch San Diego,*  
 6 *LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018); *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir.  
 7 2019); *Duran v. LaBoom Disco, Inc.*, 955 F.3d 279, 281 n. 5 (2d Cir. 2020). The Third,  
 8 Seventh, and Eleventh Circuit concluded that an ATDS must use a random or sequential  
 9 number generator to store and produce numbers. *See Glasser v. Hilton Grand Vacations Co.,*  
 10 *LLC*, 948 F.3d 1301, 1306 (11th Cir. 2020); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 466-  
 11 69 (7th Cir. 2020); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018).

12 Facebook petitioned the United States Supreme Court to review the Ninth Circuit’s  
 13 decision and the Supreme Court granted certiorari. The case is fully briefed and the Supreme  
 14 Court heard oral argument on December 8, 2020.

### 15 III. AUTHORITY

16 Plaintiff submits that there is “good cause” under Fed. R. Civ. P. 16(b) because the  
 17 Supreme Court’s decision in *Facebook* will substantially impact the analysis needed by both  
 18 parties’ expert witnesses when determining if the Genesys dialing system is an ATDS under the  
 19 TCPA. “The focus of the [‘good cause’] inquiry is upon the moving party’s reasons for seeking  
 20 modification” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992).  
 21 Here, the requested extension benefits both parties because the expert witness for each party  
 22 will almost certainly rely on the Supreme Court’s binding holding in *Facebook*. Briefly  
 23 extending the deadline for the parties to submit expert testimony on this issue will save the  
 24 parties significant resources and obviate any motions to supplement their expert reports to  
 25 address *Facebook*.  
 26  
 27

Plaintiff's requested extension will not delay this matter's resolution. Plaintiff will disclose expert testimony on all subjects except for the ATDS issue in accordance with the case management schedule currently in place. Plaintiff also will file his motion for class certification in February in accordance with the current case management schedule. Because expert testimony on the ATDS issue goes to the merits of Plaintiff's cell phone claim, it is reasonable to defer that expert work until after class certification has been briefed.

#### IV. CONCLUSION

For all the above reasons, Plaintiff respectfully requests that his motion be granted and the Court order the following schedule:

EVENT	DATE
Reports from expert witness under FRCP 26(a)(2) due EXCEPT FOR witnesses testifying on whether Hearing Help's Genesys system is an ATDS	January 15, 2021
Deadline to move for class certification	February 25, 2021
Reports from expert witnesses under FRCP 26(a)(2) on the ATDS issue	August 6, 2021 or 30 days following the Supreme Court's decision in <i>Duguid v. Facebook</i> , whichever is earlier
JURY TRIAL DATE	November 1, 2021

1 RESPECTFULLY SUBMITTED AND DATED this 30th day of December, 2020.

2  
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CERTIFICATE OF SERVICE

I, Adrienne D. McEntee, hereby certify that on December 30, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 30th day of December, 2020.

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